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No. 06-1505

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

BRIEF AMICI CURIAE OF AARP, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

STEFANO MOSCATO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 MONTGOMERY ST.
SUITE 2080
SAN FRANCISCO, CA 94104

PAUL W. MOLLICA
MEITES, MULDER, MOLLICA
& GLINK
20 S. CLARK ST., STE 1500
CHICAGO, IL 60603

Counsel for *Amicus Curiae*
NELA

LAURIE A. MCCANN*
AARP FOUNDATION LITIGATION
MELVIN RADOWITZ
AARP
601 E STREET, N.W.
WASHINGTON, DC 20049
(202) 434-2060
Counsel for *Amicus Curiae* AARP
*Counsel of Record

RACHEL B. LEVINSON
AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS
1012 FOURTEENTH ST., NW, STE 500
WASHINGTON, DC 20005-3465
Counsel for *Amicus Curiae* AAUP

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. BOTH THE LANGUAGE AND CONTEXT OF THE REASONABLE FACTORS OTHER THAN AGE PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE 4

1. The Placement of the RFOA Provision Contiguous to the ADEA's Other Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense for which the Employer Bears the Burden of Proof 5

2. By Including The Prefatory Language "Any Action Otherwise Prohibited" in §4(f)(1), Congress Manifested Its Intent to Create an Affirmative Defense to a Violation of ADEA § 4(a) 9

II. LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN AFFIRMATIVE DEFENSE 12

III. A PARTY SEEKING TO ESCAPE LIABILITY FOR A STATUTORY VIOLATION BEARS THE BURDEN OF PROOF 16

IV. REQUIRING AGE DISCRIMINATION VICTIMS TO PROVE THAT AN EMPLOYER'S RELIANCE ON A FACTOR THAT ADVERSELY IMPACTED OLDER WORKERS WAS "UNREASONABLE" WOULD SIGNIFICANTLY WEAKEN THE ADEA'S PROTECTIONS 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

A.H. Phillips, Inc. v. Walling,
324 U.S. 490 (1945) 17

Alaska Dept. of Envtl. Conservation v. EPA,
540 U.S. 461 (2004) 18

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 16

Auer v. Robbins, 519 U.S. 452 (1997) 15

Bell Atlantic v. Twombly,
127 S. Ct. 1955 (2007) 21

Chevron USA Inc. v. Echazabal,
536 U.S. 73 (2002) 14

City of Los Angeles, Dep't of Water and Power v. Manhart,
435 U.S. 702 (1978) 19

Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) 18

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 12

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989) 5

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 19

Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994) 3

Dothard v. Rawlinson,
433 U.S. 321 (1977) 14, 17

EEOC v. Wyoming, 460 U.S. 226 (1983) 8, 24

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 5

Federal Express Corp. v. Holowecki, No. 06-1322,
2008 WL 508018 (U.S. 2008) 15

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 16, 17

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 6

Gomez v. Toledo, 446 U.S. 635 (1980) 18

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 14

Int'l Union v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 18

Karlen v. City Coll. of Chicago,
837 F.2d 314 (7th Cir. 1988) 17

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 6

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 5

Leocal v. Ashcroft, 543 U.S. 1 (2004) 7

Mahoney v. Radio Free Europe/Radio Liberty, Inc.,
818 F. Supp. 1 (D.D.C. 1992),
rev'd on other grounds, 47 F.3d 447
(D.C. Cir. 1995) 7

Maresco v. Evans Chemetics,
964 F.2d 106 (2d Cir. 1992) 21

Meacham v. Knolls Atomic Power Lab.,
381 F.3d 56 (2d Cir. 2004) 22

Meacham v. Knolls Atomic Power Lab.,
461 F.3d 134 (2d Cir. 2006) 15

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007) 15

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) 19

Orzel v. Wauwatosa Fire Dep't,
697 F.2d 743 (7th Cir. 1983) 24

Pippin v. Burlington Resources Oil and Gas Co.,
440 F.3d 1186 (10th Cir. 2006) 21

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 19

Pub. Employees Retirement Sys. of Ohio v. Betts,
492 U.S. 158 (1989) 6

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005) 4, 17, 18

Smith v. City of Des Moines, Iowa,
99 F.3d 1466 (8th Cir. 1986) 21

Smith v. City of Jackson, Mississippi,
544 U.S. 228 (2005) ..... *passim*

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 18

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 6, 7

United States v. First City Nat'l Bank,
386 U.S. 361 (1967) 16

United States v. N.Y., New Haven & Hartford R.R. Co., 355 U.S. 253 (1957) 18

United States v. Paramount Pictures,
334 U.S. 131 (1948) 20

W. Air Lines, Inc. v. Criswell,
472 U.S. 400 (1985) 6, 8

Washington County v. Gunther,
452 U.S. 161 (1981) 12

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 24

STATUTES AND LEGISLATIVE HISTORY

Age Discrimination Employment Act of
1967 (ADEA),
29 U.S.C. § 621 (a)(2) 23
29 U.S.C. § 623(a) 4, 7, 8, 9
29 U.S.C. § 623(f)(1) ..... *passim*
29 U.S.C. § 623(f)(2) 9, 10, 11, 17

Equal Pay Act, 29 U.S.C. § 206(d) 12

Older Americans Act Amendments of 1984,
Pub. L. No. 98-459, 98 Stat. 1767 (1984) ... 6

Older Workers Benefit Protection Act
(OWBPA), Pub. L. No. 101-433,
104 Stat. 978 (1990) 9, 10

Pub. L. No. 89-602, 78 Stat. 265 (1996) 13

42 U.S.C. § 2000e-5(g)(2)(B) 19

H.R. 90-13054 (1967) 7

H.R. Rep. No. 101-664 (1990) 11

S. 90-830 (1967) 7

U.S. Dept. of Labor, THE OLDER WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) 13, 24

113 Cong. Rec. 1377 (1967) 13
113 Cong. Rec. 2467-2476 (1967) 13

REGULATIONS

29 C.F.R. 1625.7 11
29 C.F.R. 1625.7(d) 14
29 C.F.R. § 1625.7(e) (2004) 14
29 C.F.R. § 860.102(b) 13
29 C.F.R. § 860.103(e) 13
29 C.F.R. § 860.103(f) 13
29 C.F.R. § 860.103(f)(2) 13
29 C.F.R. §§ 860.103-04 (1970) 12
33 Fed. Reg. 9172 (1968) 12
33 Fed. Reg. 9173 (1968) 13

MISCELLANEOUS

Clarence Thomas, Chairman, EEOC, Policy Guidance: Analysis of "Foreign Laws" Defense of ADEA (Dec. 5, 1989) 7

W. Richardson, EVIDENCE (6th ed. 1944) 3

INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's more than 40 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and other employment laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members in all academic disciplines. The AAUP is committed to the protection of members' rights to academic freedom, tenure, and freedom from discrimination. *See, e.g.*, *On Discrimination and 1940 Statement of Principles on Academic Freedom* and *Tenure*, AAUP Policy Documents & Reports (10th Ed., 2006). The AAUP

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[1] This Brief of *Amici Curiae* AARP, the American Assosication of University Professors, and the National Employment Lawyers Association (NELA) in support of Petitioners is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, *amici* state that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

and its members are concerned that university administrators could utilize the job-evaluation matrix that Knolls Atomic Power Laboratory deployed to lay off tenured professors in cases of financial exigency. In such circumstances, the burden of proof must be on administrators, who control such a process, to prove that their methods were reasonable despite their disparate impact on ADEA-protected faculty members. Failure to correctly assign the burden of proof would undermine professors' ability to ensure freedom from age discrimination in the academic workplace.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a current membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the work place. NELA advocates for employee rights and work place fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The *amici* have filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws ensuring full enforcement of the laws and full protection of the rights of workers. In addition, all filed *amici curiae* briefs with this Court in *Smith v.*

City of Jackson, Mississippi, 544 U.S. 228 (2005), and both AARP and NELA filed briefs with the U.S. Court of Appeals for the Second Circuit in this case concerning the applicability and appropriate standard for disparate impact claims under the ADEA.

SUMMARY OF ARGUMENT

Well before the enactment of the ADEA in 1967, the concept of "burden of proof" acquired a settled meaning in American law: "The emerging consensus on a definition of burden of proof was reflected in the evidence treatises of the 1930's and 1940's. 'The burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings.'" *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (citing W. Richardson, EVIDENCE 143 (6th ed. 1944)).

In this case, the Court is called upon to decide which party shoulders that obligation with respect to the "reasonable factors other than age" (RFOA) provision under section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). To resolve this issue, the Court may call on several conventions of statutory construction and interpretation. All lead to the same conclusion: that Congress intended the employer to bear the burden of proving the existence of such "reasonable factors."

The specific language of the RFOA provision "to take any action otherwise prohibited" together with

"factors other than age" presumes that a violation of ADEA section 4(a) has been established due to the adverse effects of a neutral employment practice on older individuals because of age. The language, as well as the placement of the RFOA with the other affirmative defenses in ADEA section 4(f)(1), 29 U.S.C. § 623(f)(1), strongly supports the conclusion that the RFOA is an affirmative defense on which the employer bears the burden of proof.

ARGUMENT

I. BOTH THE LANGUAGE AND CONTEXT OF THE REASONABLE FACTORS OTHER THAN AGE PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE.

This Court has declared that "[w]hen we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Accordingly, resolution of the question of which party bears the burden of proof under section 4(f)(1) of the ADEA must begin with the statutory language, which states:

> It shall not be unlawful for an employer, employment agency, or labor organization —
> (1) *to take any action otherwise prohibited* under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the

> particular business, or *where the differentiation is based on reasonable factors other than age* or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

29 U.S.C. § 623(f)(1) (2006) (emphasis added).

1. The Placement of the RFOA Provision Contiguous to the ADEA's Other Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense for which the Employer Bears the Burden of Proof.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").[2] The RFOA

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[2] *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("[t]he meaning - or ambiguity- of certain words or phrases may only become evident when placed in context . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overal' statutory scheme.'") (*quoting Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

provision of the ADEA is sandwiched between the bona fide occupational qualification provision (BFOQ) and the foreign workplace provision. The line of authority treating the section 4(f) exemptions as affirmative defenses is uniform and unbroken. *See Smith v. City of Jackson, Mississippi,* 544 U.S. 228, 233 n.3 (2005) ("[l]ike Title VII with respect to all protected classes except race, the ADEA provides an affirmative defense to liability where age is a 'bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . .' § 4(f)(1)"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596-97 (2004) ("[f]or the very reason that reference to context shows that 'age' means 'old age' when teamed with 'discrimination,' the provision of an affirmative defense when age is a bona fide occupational qualification readily shows that 'age' as a qualification means comparative youth") (citing 29 U.S.C. § 623 (f)); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86-87 (2000) (referring to BFOQ "defense"); *Pub. Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 176 (1989) (referring to the provisions in section 4(f)(1) as "exemptions and affirmative defenses"); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985) (endorsing BFOQ analysis used by the EEOC that places burden of proving exception on the employer); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (stating that the ADEA contains "five affirmative defenses" in 29 U.S.C. § 623(f)).[3] The

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[3] The foreign workplace provision, which was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792 has also been recognized as an affirmative defense. *See*

juxtaposition of the RFOA provision with these other affirmative defenses certainly supports a holding that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration.[4] Their contiguous relationship is, therefore, no accident. To the contrary, their purposeful placement together implies that the defenses are to be interpreted similarly. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("we construe language in its context and in light of the terms surrounding it.").

The first part of ADEA section 4(f)(1) provides an affirmative defense to facially discriminatory classifications. *See Thurston*, 469 U.S. at 122. The explicit use of age in the terms of a policy or practice is "otherwise prohibited" by section 4(a) unless justified by a BFOQ. The BFOQ defense in section 4(f)(1) permits an employer to justify the use of age as a

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Mahoney v. Radio Free Europe/Radio Liberty, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Clarence Thomas, Chairman, EEOC, Policy Guidance: Analysis of "Foreign Laws" Defense of ADEA (Dec. 5, 1989) (noting that the employer has the burden of proving the elements of the foreign workplace exception).

[4] *See* H.R. 90-13054 & S. 90-830 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 89 & 121.

criterion by demonstrating that its consideration is bona fide and reasonably necessary to the operation of the business. *Criswell*, 472 U.S. at 411-12.

If an action violating section 4(a) has been established, an employer can also utilize the RFOA defense provided in the second part of ADEA section 4(f)(1). The "factors other than age" language in the RFOA provision connotes that the second part of ADEA section 4(f)(1) responds to classifications that are facially neutral, for facially discriminatory policies are addressed by the BFOQ provision. The Court in *EEOC v. Wyoming* established that a BFOQ affirmative defense responds to a facially discriminatory violation, while an employer may assert the RFOA provision when it used a factor that, while facially neutral, adversely impacted older workers. 460 U.S. 226, 232-33 (1983) ("[I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful 'where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.' § 4(f)(1), 29 U.S.C. 623(f)(1)."). Therefore, the placement and context of the RFOA provision support reading the provision as a defense to facially neutral actions that violate § 4(a).

2. By Including The Prefatory Language "Any Action Otherwise Prohibited" in §4(f)(1), Congress Manifested Its Intent to Create an Affirmative Defense to a Violation of ADEA § 4(a).

The RFOA provision begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). As explained in the preceding section, this prefatory phrase presupposes that a violation of an ADEA prohibition has been established. By this language, Congress placed the burden of proof on the employer. As demonstrated below, Congress added the identical language to ADEA section 4(f)(2), 29 U.S.C. § 623(f)(2), in the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, § 103(1) (1990), to remove any doubt that section 4(f)2) of the ADEA is an affirmative defense.

Prior to 1990, ADEA section 4(f)(2) did not include the proviso language "to take any action otherwise prohibited" but instead had read:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act . . . .

29 U.S.C. § 623(f)(2) (1989).

The OWBPA's amendment to section 4(f)(2)[5] reflects Congress' understanding of the meaning and effect of the key phrase "otherwise prohibited" in section 4(f)(1). Congress copied the proviso language from section 4(f)(1) to make unmistakably clear that

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[5] The OWBPA amended section 4 of the ADEA by "inserting the following new paragraph:

> '(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –
>
> > '(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or
> >
> > '(B) to observe the terms of a bona fide employee benefit plan –
> >
> > > '(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1635.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or
> > >
> > > '(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act."

Pub. L. No. 101-433, § 103 (1990).

the similarly structured section 4(f)(2) was to be interpreted in parity with section 4(f)(1):

> The Committee intends that the amendments made by the bill to section 4(f)(2) . . . should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defenses, section 4(f)(1). Accordingly, the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added)) should be applied to the revised section 4(f)(2) . . . The Committee [ ] endorses the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception.

H.R. Rep. No. 101-664, at 253-54 (1990). Although this passage refers to an earlier draft of the OWBPA, which had included language, subsequently dropped, stating that employers relying on either a BFOQ or RFOA "shall have the burden of proving such actions are lawful," the message of the passage is still valid and relevant: Congress intended for the identical

language in both sections to have the same effect – create an affirmative defense.

Finally, faced with comparable language in the Equal Pay Act, 29 U.S.C. § 206(d), this Court recognized that the parallel "other factors other than sex" provision is an affirmative defense, on which the employer bears the burden of proof. *Washington County v. Gunther*, 452 U.S. 161, 170-71 (1981); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). If anything, the RFOA exception is narrower than its counterpart under the EPA, because it requires that the factor relied upon be "reasonable," and should be construed more strictly against the employer. *Smith*, 544 U.S. at 239, n. 11, (describing as "instructive" the fact that, unlike EPA's defense which may extend even to unreasonable factors, the defense under the ADEA must meet a reasonableness standard).

II. LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN AFFIRMATIVE DEFENSE.

Just days after the ADEA became effective, the Department of Labor (DOL) issued interpretative regulations of the new statute. 33 Fed. Reg. 9172 (1968), 29 C.F.R. §§ 860.103-04 (1970). Those contemporaneous DOL interpretations provide insight into the meaning and application of the RFOA provision, particularly since they were written by DOL Secretary Wirtz, whose administration also drafted the ADEA to implement the recommendations

contained in his 1965 Report to Congress.[6] *See* 113 Cong. Rec. 1377 (1967).

The DOL interpreted the RFOA provision as an affirmative defense to non-age-related factors and stated that both the BFOQ and RFOA defenses in section 4(f)(1) "must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . . ." 29 C.F.R. § 860.102(b), 860.103(e), 33 Fed. Reg. 9173 (1968). As examples of "differentiations based on reasonable factors other than age," DOL identified employee tests, 29 C.F.R. § 860.103(f), quantity or quality of production, and educational requirements. 29 C.F.R. § 860.103(f)(2). These practices are the very types of facially neutral practices that have since been

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[6] U.S. Dept. of Labor, THE OLDER WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) ("WIRTZ REPORT"). Following the Wirtz Report, Congress directed the Secretary of Labor to submit legislative recommendations to include:

> Provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. No. 89-602, § 606, 78 Stat. 265 (1966). In response to Congress' request, the "President's recommendation" was introduced as S. 830 by Senator Yarborough on February 3, 1967. 113 Cong. Rec. 2467-2476 (1967).

challenged under the disparate impact method of proof in Title VII cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (physical fitness standards).

When the EEOC subsequently assumed responsibility for the enforcement of the ADEA, it continued to view the RFOA provision as an affirmative defense: "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e) (2004).

As the Court found in *Chevron USA Inc. v. Echazabal*, 536 U.S. 73 (2002), a reasonable EEOC regulation promulgated within the agency's rule-making authority ought to be enforced. Reviewing an Americans with Disabilities Act (ADA) regulation defining the "direct threat" defense, the Court unanimously held that "the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U.S.C. § 12113(a)." *Id.* at 85.

In the present case, the Second Circuit declined to apply the EEOC's interpretation of RFOA because (1) the regulation mentions only an "individual claim of discriminatory treatment," not disparate impact, and (2) it considered that the holding in "*City of Jackson* directly contradicts 29 C.F.R. § 1625.7(d),

which interprets the RFOA provision as mandating a 'business necessity' test when a plaintiff has established a *prima facie* case of disparate impact, . . ." *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 142 n.6 (2d Cir. 2006).

The Second Circuit's first justification runs afoul of the principle that "[a]n agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2537-38 (2007) (*quoting Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Just this term, the Court reiterated the importance of deference to the EEOC's administrative authority in *Federal Express Corp. v. Holowecki*, No. 06-1322, 2008 WL 508018 (U.S. 2008): "Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force." The Court considered pertinent the fact that the "EEOC has adopted this position in the Government's *amicus* brief and in various internal directives it has issued to its field offices over the years." *Id.* at *6. Similarly, in the present case, the United States has filed an *amicus* brief in support of its regulation placing the burden of RFOA on the employer (as the EEOC did in the Second Circuit below). *See Auer*, 519 U.S. at 462 (where agency was not merely defending its own actions in litigation, there was "no reason to suspect that the interpretation [in an amicus brief] does not reflect the agency's fair and considered judgment on the matter in question.").

As to the Second Circuit's second justification, the court misapprehended the Court's *Smith* decision, which did not consider the burden of proof, much less assign it to the plaintiff. There, the employees failed to establish a *prima facie* case of disparate impact; that is, they never "identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." *Smith*, 544 U.S. at 241. The plurality concluded that there was no disputed issue of fact about the reasonableness of the employer's stair-step wage policy "to raise the salaries of junior officers to make them competitive with comparable positions in the market." *Id.* at 242. *Smith* left the question of burden of proof on RFOA open not because it was a close or difficult question, but because the facts before the Court in *Smith* did not require the Court to determine where the burden of proof lay.

III. A PARTY SEEKING TO ESCAPE LIABILITY FOR A STATUTORY VIOLATION BEARS THE BURDEN OF PROOF.

When a party seeks to defend a violation by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See, e.g.*, *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (as a general rule, party claiming the benefits of an exception bears the burden of proof); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (FLSA exemptions are to be "narrowly construed against . . . employers" and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit"); *FTC v.*

Morton Salt Co., 334 U.S. 37, 44-45 (1948) ("the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"). There is no special basis for concluding here that the employer should be free of this burden under section 4(f) of the ADEA. In fact, this general rule is applied with special force in the context of a remedial statute like the ADEA. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (Title VII BFOQ exception); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (Fair Labor Standards Act exception). As the U.S. Court of Appeals for the Seventh Circuit stated with regard to section 4(f)(2) of the ADEA, the ADEA's affirmative defense for cost-based age-related differences in employee benefits, "[W]here . . . the employer uses age – not cost, or years of service, or salary – as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2)." *Karlen v. City Coll. of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988). The same reasoning should hold true for the ADEA's "reasonable factors other than age" affirmative defense – if an employer wants to shelter in its safe harbor, the employer must be expected to prove that its actions were based on a factor "other than age" that was "reasonable."

This Court has also embraced "[t]he ordinary rule, based on considerations of fairness," that it does "not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Schaffer ex rel. Schaffer*, 546 U.S. at 60

(quoting *United States v. N.Y., New Haven & Hartford R. R. Co.*, 355 U.S. 253, 256 n.5 (1957) and citing *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993)); *see also Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) ("[A]llocations of burdens of production and persuasion may depend on which party-plaintiff or defendant, petitioner or respondent – has made the 'affirmative allegation' or 'presumably has peculiar means of knowledge.'") (citation omitted). The employer has superior awareness of the reasons for its policies, especially where (as here) they are alleged to be subjective. *See Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (regarding defense of qualified immunity, "[t]he existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know"; for example, "the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware.").

The Court has long recognized the burden on the employee to prove discrimination in employment discrimination cases. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (employee bears the "ultimate burden of persuading the court that she has been the victim of intentional discrimination"). But, correspondingly, the Court expects employers to step forward and justify (under an exemption or defense) policies that demonstrably disadvantage a protected class. *See, e.g., Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (fetal-protection program that barred women from certain assembly jobs; "[w]e have no difficulty

concluding that Johnson Controls cannot establish a BFOQ"); *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 717 n.31 (1978) (policy requiring women to pay more for pension benefits; "even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.").

For the same reasons, in Title VII mixed motive cases an employer is required to prove that it would have taken the same action against an employee, notwithstanding a discriminatory factor. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003) (noting under 42 U.S.C. § 2000e-5(g)(2)(B) that "in order to avail itself of the [mixed-motive] affirmative defense, the employer must 'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor'"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion) (shifting burden of proof in mixed-motive cases). This analysis also applies when construing the ADEA. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (noting that the Court has "incorporated Title VII standards when interpreting statutes prohibiting other forms of discrimination.").

IV. REQUIRING AGE DISCRIMINATION VICTIMS TO PROVE THAT AN EMPLOYER'S RELIANCE ON A FACTOR THAT ADVERSELY IMPACTED OLDER WORKERS WAS "UNREASONABLE" WOULD SIGNIFICANTLY WEAKEN THE ADEA'S PROTECTIONS.

A requirement that plaintiffs alleging violations of the ADEA, having already "isolat[ed] and identif[ied] the *specific* employment practice[ ]" that had a disproportionately adverse impact on older workers, *Smith*, 544 U.S. at 241, carry the additional burden of proving the absence of "reasonable factors other than age," would cripple age discrimination victims' ability to prevail on a disparate impact claim. Under such a standard, employers could easily articulate "other factors" without being obligated to prove them. As a result, bringing a disparate impact claim might become an exercise in futility.

Since the employer is in the best position to evaluate the factors related to performance of the job, and more likely to have access to data justifying the policy or practice at issue, the burden of proving the reasonableness of the factors it chose should logically be placed on the employer. *See United States v. Paramount Pictures*, 334 U.S. 131, 148 (1948) ("To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects.").

To make refuting an RFOA an element of the employee's case would require plaintiffs, even before

civil discovery, to plead the RFOA in their complaints and to present plausible explanations as to why the factors are unreasonable. *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1967 (2007) ("plausible entitlement to relief" must be pled at outset of case and should not await discovery). It would require employees to be gifted with second sight: to know in advance what reasons the employer might advance, and to attack the rationale, all without access to the employer's records or witnesses.

A review of some of the RFOAs asserted in past cases reveals how impracticable it would be for age discrimination victims to plead and disprove that an employer's reliance on the factor was reasonable. Sometimes, the reasons are purely internal business strategies to which the employer alone has privileged access. *See, e.g., Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006) ("[c]orporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations"); *Maresco v. Evans Chemetics*, 964 F.2d 106, 113 (2d Cir. 1992) (stating decision to consolidate offices and terminate some workers may be based on "considerations of cost and administrative convenience" may be RFOA). Or proof of the "reasonable" factors may be technical and beyond the employees' ken at the pleading stage. *See, e.g., Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1471 (8th Cir. 1996) (city defended policy of requiring firefighters to pass annual physical fitness tests for approval to wear a self-contained breathing apparatus (a job requirement) as an RFOA; policy was tied to "the

extensive regulations governing the manner in which the city operates its fire department").

This present case also illustrates how unjust it is to require age discrimination victims to plead and disprove an employer's assertion that the substantial adverse impact on older workers was in fact based on "reasonable factors other than age." In a reduction-in-force case like this one, the employer is in the unique position to know what the organization seeks to achieve going forward and what its specific objectives for the work force reduction were. How retaining employees with the characteristics of "criticality" and "flexibility" would help the organization meet these objectives; and why those characteristics were necessary for the future success of the organization is knowledge that the Respondent should have easily been able to produce. That same knowledge is not available to terminated employees who may not have even been aware that a reduction-in-force was being contemplated and most certainly were not privy to information concerning the goals and objectives of the reduction-in-force. In this case, the factors relied upon resulted in "startlingly skewed results," *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 75 (2d Cir. 2004) and it is appropriate to require the Respondent and other defendants to prove that reliance on factors that cause such stark disparities was reasonable.

Where age discrimination has been shown, the RFOA defense must constitute more than a mere denial of such discrimination. As this Court recognized in *Smith*, Congress' decision to include the RFOA provision "is consistent with the fact that age,"

in some circumstances, "has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 240. Significantly, however, the *Smith* Court also pointed out that Congress "recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact." *Id.* Indeed, the ADEA was enacted after a finding by Congress that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice . . . ." 29 U.S.C. § 621 (a)(2) (2006). The legislative history of the Act makes clear that the broad remedial purpose of the ADEA is to eliminate age-based stereotypes in favor of individualized employment decisions based on a person's ability and capability.[7]

Given the tendency to make inaccurate age-based assumptions about an individual's ability to perform a job, and bearing in mind the ADEA's

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[7] *See Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. On Labor and Public Welfare*, 90th Cong. 28 (1967) (statement of Sen. Jacob Javits) ("We must break down the wholly irrational barriers to employment based on age alone which have been permitted to hinder the older worker in a search for employment opportunity. This present age has been called an age where the cult of youth seems to prevail over everything else . . . [I]t will be our job to introduce a note of realism in that situation which will emphasize the ability and capability of the worker to do the job, rather than his age level, as the desirable criterion for American employment practices.").

purpose of eradicating such assumptions, any exception to the Act must be interpreted to advance rather than frustrate its purpose. So, while the RFOA defense does contemplate that some policies that adversely impact older workers may be justified because they are based on age-neutral, job-related factors, "overuse of [an] exception involves the risk of reintroducing on a broad scale the very age stereotyping the ADEA was designed to prevent." *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983).

If plaintiffs must prove the absence of a "reasonable factor other than age", the value of the disparate impact theory in ferreting out "the problem of subconscious stereotypes and prejudices," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), will be wholly negated. In *EEOC v. Wyoming*, the Court recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes," 460 U.S. at 231; *see* WIRTZ REPORT at 8. The Report elaborated that "a great many age limitation policies are based in fact on considerations quite different from those offered as (and undoubtedly believed to be in many cases) their explanation." *Id.* The Report identified the physical demands of the particular job in question as one of the age-neutral explanations offered by employers for excluding older workers, but noted as relevant, that "in determining the true basis for these age limitations which are explained in terms of physical demands of the work . . . in 70 percent of the cases of claimed basing of age limits on physical capabilities . . . no studied basis for

this conclusion was reported." *Id.* If employers are not required to prove that the age-neutral factor relied upon was "reasonable," employers will be free to act based on age-correlated factors that can be used to disguise age-stereotyping and may discriminate against older workers with ease.

CONCLUSION

For the foregoing reasons, *amici* AARP, AAUP and NELA respectfully submit that this Court should hold that the employer bears the burden of persuasion on the ADEA's "reasonable factor other than age" defense. Accordingly, the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the case remanded for further proceedings.

Respectfully submitted,

Stefano Moscato
National Employment
Lawyers Association
44 Montgomery St.
Suite 2080
San Francisco, CA 94104

Laurie McCann*
AARP Foundation
Litigation
Melvin Radowitz
AARP
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
*Counsel of Record

Paul W. Mollica
Meites, Mulder, Mollica
& Glink
20 S. Clark St., Ste 1500
Chicago, IL 60603

Counsel for *Amicus Curiae*
NELA

Rachel B. Levinson
American Association
of University Professors
1012 Fourteenth St., NW
Ste 500
Washington, DC 20005

Counsel for *Amicus*
Curiae AAUP